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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 80-1805

FRANK M. BOSWORTH, d/b/a
GULF TO BAY TITLE COMPANY,
Appellant,

v.

WILLIAM J. COONEY, as EXECUTOR
OF THE ESTATE OF DONALD S. FORD, Deceased,
Appellee.

ON APPEAL
FROM THE SUPREME COURT OF GEORGIA

MOTION TO DISMISS APPEAL

WILLIAM J. COONEY
1104 Georgia Bank Building
Augusta, Georgia 30902

Counsel for Appellee

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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM J. COONEY, as EXECUTOR
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Appellee.

ON APPEAL
FROM THE SUPREME COURT OF GEORGIA

MOTION TO DISMISS APPEAL

Pursuant to Rule 16.1(b) of the Rules of the Supreme Court, Appellee moves the Court to dismiss the appeal on the grounds hereinafter set forth.

JURISDICTION

This is an appeal from the denial of the Supreme Court of Georgia to grant the

writ of certiorari to review the decision of the Court of Appeals of Georgia affirming the entry of a default judgment against the Appellant in the trial court. Appellant invokes the jurisdiction of this Court under 28 U.S.C. §1257. The judgment of the trial court was entered on April 29, 1980, and affirmed by the Court of Appeals of Georgia on October 20, 1980 (J.S., App. B). Rehearing was denied by the Court of Appeals on November 14, 1980. The Supreme Court of Georgia denied the writ of certiorari on February 3, 1981, and the Notice of Appeal to this Court was filed on February 17, 1981.

QUESTIONS PRESENTED

1. Whether default judgment was properly entered against Appellant because he did not file an Answer to the Complaint served upon him as required by Section 12

of the Georgia Civil Practice Act (Ga. Code Ann. §81A-112(a)).

2. Whether Appellant timely raised the issue of denial of due process in the state court when he states he did not raise this issue in the trial court or in the Court of Appeals of Georgia but waited until he applied for writ of certiorari to the Supreme Court of Georgia to raise this issue.

STATUTES INVOLVED

Two Georgia statutes are involved:

(a) Section 12 of the Georgia Civil Practice Act (Ga. Code Ann. §81A-112), which is set out in Appellant's Jurisdictional Statement, Appendix H-2;

(b) Section 55 of the Georgia Civil Practice Act (Ga. Code Ann. §81A-155), which is set out in Appendix A, this Motion.

STATEMENT

Appellee Cooney filed suit on January 16, 1980, in the Superior Court of Richmond County, Georgia, against the Appellant Frank M. Bosworth, Jr., a resident of Florida (J.S., App. B-3) and an experienced attorney who has practiced law for many years in the States of New York and Florida (J.S., 10,15). The suit alleged that Appellant had breached an escrow agreement in connection with a real estate transaction which he had executed in Augusta, Georgia. The terms of the escrow agreement required Appellant to accept only cash earnest money from the prospective purchaser. However, Appellant accepted a check and a note which were subsequently dishonored when presented for payment. As a result, Appellee suffered damages (J.S., App. B-5).

The return of service of the Summons and Complaint shows Appellant Bosworth was served in Clearwater, Florida, (App. B, this Motion). The Summons clearly advised Appellant that:

> You are hereby summoned and required to file with the Clerk of said court . . . an answer to the complaint which is herewith served upon you, within thirty (30) days of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

However, instead of filing an Answer as required to do by the Summons, Appellant elected to file a motion contesting the trial court's subject matter and personal jurisdiction over him (J.S.-10, 11).

On April 28, 1980, the trial court held a hearing on Appellant's Motion to Dismiss and denied the jurisdictional motions (J.S.-12, App. B-1). The trial

court subsequently entered a default judgment against Appellant because he had not filed an Answer to the Complaint as required under the Georgia Civil Practice Act or filed a motion to open the default as permitted by the Georgia Civil Practice Act (J.S., App. D). Thereafter, the Appellant moved to set aside the judgment entered against him on the ground that the documents which he had filed constituted an Answer to the Complaint (App. C, this Motion). The trial court denied Appellant's motion because he had not filed an Answer as required by law (J.S., App. D). Appellant then appealed to the Court of Appeals of Georgia enumerating seven errors allegedly committed by the trial court (J.S.-12). The denial of due process was not one of the enumerated errors (App. D, this Motion). Appellant states

in his jurisdictional statement that the first time he raised the due process issue was when he applied to the Supreme Court of Georgia for the writ of certiorari (J.S.-13,14). That Court denied Applicant's petition for the writ of certiorari without comment (J.S., App. A).

ARGUMENT

1. Default judgment was properly entered against Appellant because he did not file an Answer to the Complaint within thirty (30) days after service of the Summons upon him as required by Section 12 of the Georgia Civil Practice Act (Ga. Code Ann. §81A- 112(a)).

Appellant's failure to comply with the Georgia Civil Practice Act was the basis for the entry of the default judgment against him, not any deprivation of due process. Section 12(a) of the Georgia

Civil Practice Act (Ga. Code Ann. §81A-112(a)) states that: "A defendant shall serve his answer within thirty (30) days after service of the summons and complaint upon him, unless otherwise provided by statute." (Emphasis added) (J.S., App. H-2). Section 12(a) of the Georgia Civil Practice Act is significantly different from Rule 12(a) of the Federal Rules of Civil Procedure in that under the Georgia Civil Practice Act the filing of a motion does not toll the time in which to file an Answer. The requirement in Georgia that a defendant shall serve his Answer within thirty (30) days after the service of Summons and Complaint upon him is absolute.

The purpose of service of process is to give adequate notice of a claim against a defendant and to compel him to appear and Answer. Sheetmetal Workers Int'l Association v. Carter, 241 Ga. 220,

at 221, 244 S.E.2d 860 at 861 (1978). In the case at bar, Appellant was properly served with a copy of the Summons and the Complaint (J.S., App. B-1). The Summons expressly advised him that he was required to file an Answer to the Complaint within thirty (30) days after service of the Summons upon him or suffer entry of judgment by default (App. A, this Motion). Appellant Bosworth acknowledges in his Jurisdictional Statement that he read Section 12 of the Georgia Civil Practice Act (Ga. Code Ann. §81A-112) (J.S.-10). Therefore, it is undisputed that Appellant had actual knowledge of the Georgia statute which required him to file an Answer within thirty (30) days after Service of Summons. Nevertheless, instead of filing an Answer to the Complaint as required by the statute, he elected to defend against the action by filing a motion contesting the trial

court's jurisdiction (J.S.-10,11). On appeal, the Court of Appeals of Georgia carefully examined the documents filed by Appellant to see if they were the legal equivalent of an Answer (J.S., App. B-4). That court concluded:

> There are no specific denials as to the allegation of plaintiff's complaint as to the execution of the escrow agreement, that defendant was to receive $50,000 in cash earnest money, to be retained as liquidated damages in the event of default, and that defendant that fendant accepted from the purchaser a $10,000 check and $40,000 note contrary to his agreement, and plaintiff was thereby damaged.
>
> As there was no general denial, and no specific denial as to the principal allegations of the complaint, such allegations stand admitted. There was no answer - within the meaning of the Code, and the trial court did not err in entering default judgment (J.S., App. B).

Section 55(a) of the Georgia Civil Practice Act (Ga. Code Ann. §81A-155(a)) provides that:

> If in any case an answer has not been filed within the time required by this Title, such a case shall automatically become in default unless the time for filing the answer has been extended as provided by law. The default may be opened as a matter or [sic] right by the filing of such defenses within fifteen (15) days of the day of default upon the payment of costs. If the case is still in default after the expiration of such period of fifteen (15) days, the plaintiff, at any time thereafter, shall be entitled to verdict and judgment by default, in open court or in chambers, as if every item and paragraph of the petition were supported by proper evidence without the intervention by a jury (App. A, this Motion).

Section 55(a) is explicit that a party who does not file an Answer within the prescribed time is automatically in default. Section 55 of the Georgia Civil Practice Act differs from Rule 55(a) of

the Federal Rules of Civil Procedure in that Section 55 does not provide for a hearing before entry of default judgment as does its federal counterpart. Under Section 55 of the Georgia Act, when a case is in default, judgment may be taken at any time after the fifteen (15) day period for opening the default as a matter of right has expired. Jessup Carpet Factory Outlet, Inc. v. Ken Carpets of La Grange, Inc., 142 Ga. App. 301, 235 S.E.2d 684 (1977).

Pursuant to the Georgia Civil Practice Act, a defendant who is properly served has been put on notice that he must file an Answer to the Complaint within thirty (30) days after service of the Summons and the Complaint upon him. If not, forty-five (45) days after service of the Summons the plaintiff will be entitled to judgment by default without further notice or proceedings. Appellant received

a copy of the Summons and Complaint. He personally reviewed the applicable Georgia statute. Appellant, an experienced attorney, cannot now be heard to complain that he was denied due process. This is especially true where Appellant was represented in the Georgia proceedings by local counsel (J.S.-12).

2. The due process violation which Appellant seeks to raise in this Court was not timely or properly raised in the state courts.

It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the federal claim was adequately presented in the state system. Cardinale v. Louisiana, 394 U.S. 437, 438, (1969); New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928); Oxley Stave Co. v. Butler Co., 166 U.S. 648,

655 (1897). In Webb v. Webb, 49 U.S.L.W. 4500, 4501 (May 18, 1981), Justice White, speaking for the Court, stated the rule that:

> This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." Street v. New York, 394 U.S. 576, 582 (1969); see also Fuller v. Oregon, 417 U.S. 40, 50, n. 11 (1974); Chambers v. Mississippi, 410 U.S. 284, 290, n. 3 (1973); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945).

Appellant admits in his Jurisdictional Statement that he did not raise the issue of denial of due process until he applied to the Supreme Court of Georgia for the writ of certiorari (J.S.-13.14). That court denied his application. (J.S., App. A). In the trial court, Appellant moved to set aside the judgment entered

against him on the sole ground that the documents filed by him constituted an Answer (App. C, this Motion). In his appeal to the Court of Appeals of Georgia, Appellant failed to enumerate the denial of due process as one of the seven enumerations of error which he alleged were committed by the trial court (App. D, this Motion). Appellant's assertion of the issue of denial of due process for the first time in his Application for the Writ of Certiorari to the Supreme Court of Georgia comes too late in the proceedings.

For the reasons stated, it is respectfully submitted that the appeal should be dismissed.

William J. Cooney
WILLIAM J. COONEY

May 1981.

APPENDIX A

CIVIL PRACTICE ACT

81A-155 [CPA § 55] DEFAULT

(a) Default judgment

If in any case an answer has not been filed within the time required by this Title, such case shall automatically become in default unless the time for filing the answer has been extended as provided by law. The default may be opened as a matter or [sic] right by the filing of such defenses within 15 days of the day of default upon the payment of costs. If the case is still in default after the expiration of such period of 15 days, the plaintiff, at any time thereafter, shall be entitled to verdict and judgment by default, in open court or in chambers, as if every item and paragraph of the

petition were supported by proper evidence without the intervention of a jury, unless the action is one ex delicto or involves unliquidated damages, in which event the plaintiff shall be required to introduce evidence and establish the amount of damages before the court without a jury as to actions ex contractu, and before a jury as to actions ex delicto with the right of the defendant to introduce evidence as to damages and the right of either to move for a new trial in respect of such damages. An action based upon account shall not be considered one for unliquidated damages within the meaning of this section.

(b) Opening default

At any time before final judgment, the court, in its discretion, upon payment of costs, may allow the default to be opened

for providential cause preventing the filing of a plea or for excusable neglect or where the judge, from all the facts, shall determine that a proper case has been made for the default to be opened, on terms to be fixed by the court. In order to allow the default to be thus opened, the showing shall be made under oath, shall set up a meritorious defense, shall offer to plead instanter, and announce ready to proceed with the trial.

(Acts 1966, pp. 609, 659; 1967, pp. 226, 238.)

APPENDIX B

Second Original Copy

No. 7336-C

SUPERIOR COURT
RICHMOND COUNTY, GEORGIA

William J. Cooney, as Executor
of the Estate of Donald S. Ford,
Deceased,

Plaintiff,

v.

Frank M. Bosworth, d/b/a
Gulf to Bay Title Company,

Defendant.

COMPLAINT

FILED IN OFFICE

this 17th day of January, 1980

/s/ Helen M. Speltz,
Clerk

CIVIL WRITS
Reel No. 96
B/B 119 Pg. 69

WILLIAM J. COONEY, P.C.
1104 Georgia Bank Building
Augusta, GA 30902
Plaintiff's Attorney

THE SUPERIOR COURT
FOR THE COUNTY OF RICHMOND
STATE OF GEORGIA

Civil Action, File Number

William J. Cooney, as Executor of the Estate of Donald S. Ford, Deceased,	)	
Plaintiff	)	
v.	)	Summons.
Frank M. Bosworth, d/b/a Gulf to Bay Title Company,	)	
Defendant	)	

To the above-named Defendant:

You are hereby summoned and required to file with the clerk of said court and serve upon William J. Cooney, P.C., plaintiff's attorney, whose address is 1104 Georgia Bank Building, Augusta, GA 30902, an answer to the complaint which is herewith served upon you, within 30 days after service of this summons upon you, exclusive of the day of service. If

you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

This 17th day of January, 1980.

/s/ Helen M. Speltz
Clerk of Court

APPENDIX C

IN THE SUPERIOR COURT OF
RICHMOND COUNTY, STATE OF GEORGIA
Civil Action, File No. 7336-C

WILLIAM J. COONEY, AS EXECUTOR OF THE ESTATE OF DONALD S. FORD, DECEASED, PLAINTIFF	MOTION TO SET ASIDE JUDGEMENT;
VS.	MOTION FOR
FRANK M. BOSWORTH, d/b/a GULF TO BAY TITLE COMPANY, DEFENDANT	STAY OF JUDGEMENT

The Defendant moves the Court pursuant to Georgia Code Annotated Section 81A-160(d) to set aside the Judgement in the above-styled action dated April 29, 1980, on the ground that a non-amendable defect

appears on the face of the record, to wit: that the documents heretofore filed by the Defendant constitute an Answer, and the action was not in default at the time the aforesaid Judgement was executed.

Defendant further moves the Court to stay the aforesaid Judgement, pending the Court's hearing on the within motion.

This 9th day of May, 1980.

/s/ Stephen H, Steinberg
STEPHEN H. STEINBERG

Attorney for Defendant

910 Georgia Railroad Bank Building
Augusta, Georgia 30902

APPENDIX D

IN THE COURT OF APPEALS OF GEORGIA

FRANK M. BOSWROTH, (sic) d/b/a GULF TO BAY TITLE COMPANY, APPELLANT VS. WILLIAM J. COONEY, AS EXECUTOR OF THE ESTATE OF DONALD S. FORD, DECEASED, APPELLEE	CASE NO. 60536 ENUMERATION OF ERRORS

1. The trial court erred in granting the Default Judgment in favor of the Plaintiff on the ground that a non-amendable defect appears on the face of the record, to-wit: That the documents filed by the Defendant constituted an Answer, and the action was not in default at the time the Default Judgment was granted.

2. The trial court erred in granting the Default Judgment in favor of the Plaintiff because the exhibits attached to Plaintiff's Complaint show that there is more than one seller and Plaintiff has no standing to sue for the entire "liquidated damages."

3. The trial court erred in granting the Default Judgment in favor of the Plaintiff because the record shows that Donald S. Ford, prior to his death, had deeded his entire interest in the subject property to his wife, Helen T. Ford, and Plaintiff has no standing to bring this action.

4. The trial court erred in granting the Default Judgment in favor of the Plaintiff because all of the Sellers should have been joined as Plaintiffs for a just adjudication of this action under Ga. Code Ann. §81A-119, and in the ab-

sence of such joinder, Plaintiff was required to plead reasons for nonjoinder.

5. The trial court erred in granting the Default Judgment in favor of the Plaintiff because the action involves unliquidated damages, and the Plaintiff should have been required to prove his damages before the Court.

6. The trial court erred in denying Defendant's Motion to Set Aside the Judgment on the grounds given in Enumerations of Error Nos. (1) - (5) above and said grounds are incorporated herein by reference in their entirety.

7. The trial court erred in denying Defendant's Motion to Dismiss for Lack of Jurisdiction Over the Person on the ground that the Court has no jurisdiction over the person of Defendant, because the Defendant is a resident of the State of Florida, not Georgia, and the undisputed facts in the record would not give the

Court "Long-Arm" jurisdiction over the Defendant under Ga. Code Ann. §24-113.1.

STATEMENT OF JURISDICTION

The Court of Appeals of the State of Georgia, rather than the Supreme Court of the State of Georgia, has jurisdiction of this case on appeal for the reason that this is an action on a contract and does not involve any matter, the exclusive jurisdiction of which is reserved to reserved to the Supreme Court of Georgia.

JAY M. SAWILOWSKY, P.C.
BY /s/ Jay M. Sawilowsky
JAY M. SAWILOWSKY
ATTORNEY FOR APPELLANT
902 Georgia Railroad
Bank Bldg.
Augusta, Georgia 30902
Tel. (404) 722-8853

/s/ Stephen H. Steinberg

STEPHEN H. STEINBERG, LEADING COUNSEL

ATTORNEY FOR APPELLANT

STEINBERG & STEINBERG

910 Georgia Railroad Bank Building

Augusta, Georgia 30902

Tel. (404) 722-1516

CERTIFICATE OF SERVICE

This is to certify that I have mailed this day three (3) copies of this Motion to Dismiss Appeal to Frank M. Bosworth, Jr., Appellant and Attorney Pro Se in the foregoing action, 1518 Winfield Road West, Clearwater, Florida 33516, by depositing the same in the United States mail in a properly addressed, postage pre-paid, envelope.

Dated this 27th day of May, 1981.

William J. Cooney

WILLIAM J. COONEY